ADMINISTRATIVE RULES OVERSIGHT COMMITTEE

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MEETING MINUTES[1]

Meeting Date:	**September 15, 2004**
Meeting Time:	**10:00 A.M.**
Meeting Place:	**State House, 200 W. Washington St., Senate Chambers**
Meeting City:	**Indianapolis, Indiana**
Meeting Number:	**2**

Members Present: **Sen. R. Michael Young, Chairperson; Sen. Luke Kenley; Sen. Lindel Hume; Sen. Richard Young; Rep. John Frenz; Rep. Jerry Denbo; Rep. Phillip Hinkle; Rep. Michael Murphy.**

Members Absent: **None.**

Senator R. Michael Young, Chairman of the Committee, convened the meeting at 10:10 a.m. Senator Young noted that the meeting's agenda would include the following items: (1) Preliminary review of a complaint concerning a Board of Accountancy rule that would establish a quality review program for certified public accountant and public accountant firms. (2) Discussion of Indiana State Department of Health rules concerning on-site sewage systems. (3) Discussion of Water Pollution Control Board rules concerning storm water run-off associated with local storm sewer systems. Turning to the first issue, Senator Young then invited testimony from Stephen Haworth, CPA, from Columbus, Indiana.

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[1] Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of $0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is http://www.ai.org/legislative/. No fee is charged for viewing, downloading, or printing minutes from the Internet.

Indiana Board of Accountancy Rule (LSA #03-270)

(1) Testimony from Stephen Haworth, CPA

Noting that he had filed the complaint[2] that led to the Committee's consideration of the proposed quality review rules,[3] Mr. Haworth distributed a letter[4] to the Committee outlining his objections to several aspects of the rules. Mr. Haworth stated that foremost among his objections was his belief that the rules are unnecessary. According to Mr. Haworth, the Board of Accountancy had not identified a single disciplinary case within the past decade that could have been prevented had a quality review been required. Citing the American Institute of Certified Public Accountants' (AICPA's) peer review[5] standards, which are incorporated by reference in the proposed Indiana rules, Mr. Haworth noted that the stated purpose of quality reviews is to improve the quality of accounting and auditing engagements through educational and remedial actions, rather than punitive actions. As evidence of the non-punitive nature of quality reviews, he pointed to the Indiana Accountancy Act (IC 25-2.1), which is modeled after the Uniform Accountancy Act and is the source of the Board's authority to adopt quality review rules. Mr. Haworth explained that the same provision that authorizes the Board to establish a quality review program[6] also prohibits the findings of a quality review from being used in a proceeding before the Board of Accountancy. According to Mr. Haworth, if improving the delivery of accounting and auditing services is the goal of the Board, a less costly and burdensome way to achieve that objective would be to require additional continuing professional education (CPE) hours in the areas of accounting and auditing.

Next, Mr. Haworth expressed his concern that the proposed rules do not adequately protect the confidentiality of client documents used in connection with a review. He argued that the Accountancy Act itself expresses contradictory principles in that it recognizes the ownership interests of the client in the client's own records, while at the same time allowing accountants to disclose data in those records during the course of a quality review. Mr. Haworth conceded that the Act protects the accountant being reviewed, by providing that the records of a review committee are privileged and by prohibiting a reviewer from testifying as to matters involved in the quality review.[7] However, he maintained that the act is silent as to the duty of the reviewer with respect to the clients of the firm under review. Furthermore, Mr. Haworth noted that neither the Act itself nor the rules prohibit a reviewer from using the reviewee's client files for the purpose of soliciting those clients or contacting

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[2]See Exhibit 1.

[3]See Exhibit 2.

[4]See Exhibit 3.

[5]There is disagreement among the interested parties as to whether a "peer review," as the term is used in AICPA's *Standards for Performing and Reporting on Peer Reviews*, is equivalent to a "quality review," which is the term used in IC 25-2.1, the Indiana statute authorizing the rules at issue. Because the different parties involved use the two terms differently (and sometimes interchangeably) to describe the reviews at issue, references to both "peer reviews" and "quality reviews" will appear throughout these minutes.

[6]See IC 25-2.1-5-8.

[7]See IC 25-2.1-5-8(b)(4).

them with offers of lower-cost or better-quality services.

Turning to the costs of a quality review, Mr. Haworth suggested that the rules create a financial disadvantage for CPA firms by requiring them to use the AICPA peer review program, rather than the less costly program offered by the National Society of Accountants (NSA). Noting that the rules allow public accountant (PA) firms to use the NSA program, Mr. Haworth argued that the NSA program should also be available to CPA firms, because the same types of services are offered by both CPA and PA firms.

Finally, Mr. Haworth argued that the economic impact of the proposed rules would exceed $500,000, due to both the large number of firms that would be affected by the rules and the significant costs involved for each firm. Accordingly, Mr. Haworth suggested that the rules should have been subjected to the fiscal analysis required for administrative rules having an estimated economic impact of more than $500,000 on regulated entities.[8] Explaining that the rules were currently being reviewed by the Attorney General before their final adoption by the Board, Mr. Haworth expressed his hope that the Attorney General would consider the rules' economic impact in the course of his evaluation. Absent any action by the Attorney General, Mr. Haworth urged the Committee to request the Board to withdraw the rules, so as to enable further debate on the issues involved. Pointing to a letter distributed earlier to the Committee,[9] he noted that Representative Jeb Bardon had asked the Board to allow the issue of quality reviews to be explored in the upcoming session of the General Assembly.

Having expressed his main objections to the rules, Mr. Haworth then invited questions from the Committee. The Chairman asked Mr. Haworth how many clients he served for whom the level of services provided would subject him to a quality review. Mr. Haworth responded that the services he performed for approximately 100 to 150 of his clients would require him to undergo the required review every three years. He noted that a quality review is required for compilation and attest services.[10] Explaining that quality review fees vary according to the types of services performed by a firm, Mr. Haworth claimed that even the lowest level review--required for firms that provide compilation services only--ranges from $500 to $900.

Returning to the issue of client confidentiality, Representative Hinkle commented that statutory confidentiality requirements do exist. Admitting that certain statutory protections do exist, Mr. Haworth pointed out that such provisions prohibit a reviewer from *disclosing* client information, but do not prohibit a reviewer from *using* such information for the reviewer's own business purposes. He noted that while the AICPA standards address such uses, there are no corresponding protections in Indiana's statute or rules.

The Chairman then asked whether Mr. Haworth's firm had ever undergone a quality review. Mr. Haworth indicated that his firm was reviewed in 1992. According to Mr. Haworth, the audit cost $2,000 and was required because he had performed one audit for

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[8]See IC 4-22-2-28.

[9]See Exhibit 4.

[10]In performing compilation services, an accountant prepares financial statements based on information provided by the client and does not express any assurance as to the statements. See IC 25-2.1-1-6.3. Attest services, on the other hand, are more involved and include services such as audits, financial statement reviews, and reviews of prospective financial information. See IC 25-2.1-1-3.8.

which he charged $1,500.

Finally, the Chairman asked whether there are any differences between the AICPA quality review standards and the NSA standards. Mr. Haworth replied that there are no practical differences in the two sets of standards, and that the only significant difference is in the cost of the different reviews. He noted that 11 other states have approved the NSA standards for reviews of CPA firms.

(2) Testimony from Byron Bruce Byers, CPA

Next, the Chairman asked Byron Bruce Byers, CPA, to address the Committee. Mr. Byers introduced himself as a sole practitioner from Princeton, Indiana, and the current President of the Indiana Society of Public Accountants. Noting his opposition to the Board's proposed rules, he explained that he performs one or two audits over the course of a year, including an audit of a nonprofit arts council in Gibson County. Although he does not charge the council for his services, performing even this one audit would subject him to the most costly form of peer review under the Board's rules. He stressed that his practice would not be the only small firm to be burdened by the rules. According to Mr. Byers, approximately 300 Indiana licensees are members of the Indiana Society of Public Accountants.[11] With about 80% of these firms performing work that would be subject to a quality review, and with costs of a review ranging from $500 to $2,500, Mr. Byers stated that the total economic impact could easily approach $500,000, assuming a $2,000 average cost and 240 affected firms.

Mr. Byers further emphasized that the costs to a firm are not limited to the cost of the review itself, which is negotiated between the reviewer and the reviewee and is paid every three years at the time of the review. As a current administrating entity of the AICPA program, the Indiana CPA Society (INCPAS) charges an annual administrative fee, ranging from $150 for a system review of a sole practitioner, to $500 for a system review of a firm with over ten professionals.[12] With respect to his own firm, Mr. Byers cited at least three additional expenses that he would incur under the new rules. First, he would incur costs to revise and re-communicate his privacy policy, which currently states that no one outside the firm has access to client information without the client's consent. This policy would have to be amended to allow for an outside review firm to have access to confidential information. Second, he would have to make costly additions to his library. In particular, he would be required under peer review guidelines to maintain a current set of accounting and auditing GAAP rules. Because he performs few audits, Mr. Byers argued that he would be paying for a subscription that he would seldom use. Third, Mr. Byers acknowledged that he would have to index and organize his audit documents, as required under peer review standards. According to Mr. Byers, the staff time required for this task represents time that could otherwise be devoted to income-generating work.

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[11]See Exhibit 5.

[12]See Exhibit 6. A system review is an on-site review required for firms that perform audits or examinations of prospective financial information. A system review evaluates a firm's system of quality control and is more extensive than either an engagement review or a report review. Engagement reviews are performed off-site for firms that perform accounting, review, or attestation engagements. Report reviews are performed off-site for firms providing compilations only. The annual administrative fees for engagement and report reviews range from $100 to $300.

Finally, Mr. Byers argued that the proposed rules are unclear as to whether providing certain routine and straightforward services would trigger the need for a peer review. For example, Mr. Byers often helps parents with college-aged children prepare the Free Application for Federal Student Aid (FAFSA). He wondered whether preparing the form could be considered a compilation engagement and thus subject to peer review. He suggested that line items requesting information about the student's and parents' income and assets essentially represent an abbreviated personal financial statement.

After Mr. Byers concluded his remarks, the Chairman asked him whether he would have to pay for a quality review even if he provided an audit engagement free of charge. Mr. Byers stated that he would have to pay for the required review. The Chairman then asked Mr. Byers whether he had ever had a complaint filed against him, and whether his firm had ever undergone a quality review. Mr. Byers indicated that he was not aware of any complaints against him, and that his firm had never been reviewed.

At that point, Senator Hume commended Mr. Byers for the free services that he provides to several nonprofit organizations in Senator Hume's district.

(3) Testimony from Larry Nunn

The Chairman then invited testimony from Larry Nunn, a member of the Board of Accountancy. Mr. Nunn explained that a peer review is a practice-monitoring program for the accounting profession that began in 1988 when the AICPA Quality Review Program was established. In 1994, the program was renamed the "AICPA Peer Review Program," but the review process involved remained the same. Before AICPA changed the name of its program, however, the Indiana Accountancy Act was enacted in 1993 and gave the Board the authority to establish a "quality review" program, reflecting the terminology of the time. Mr. Nunn stressed that the difference in nomenclature simply reflects the date of the enactment of the Indiana statute and does not indicate any substantive difference in the underlying processes.

Mr. Nunn reported that approximately 37,000 CPA firms nationwide and 450 CPA firms in Indiana voluntarily participate in the AICPA program. Furthermore, 37 states require peer review for CPA firms, and four more are in the process of adopting peer review requirements. Acknowledging that 11 states do allow CPA firms to use the NSA program, Mr. Nunn pointed out that some of those states require that the NSA standards be "substantially equivalent" to the AICPA standards. According to Mr. Nunn, the Indiana Board had considered the NSA standards and concluded that they were not substantially equivalent to the AICPA standards.

Mr. Nunn then responded to the complaints expressed by the previous speakers. First, he pointed out that quality reviews are required only for attest engagements, which include audits, and for compilation services. In response to a question by the Chairman as to whether a small firm performing only one audit would be required to undergo a peer review, Mr. Nunn answered in the affirmative. Pointing to the example of the sole practitioner who performs a single audit for a nonprofit organization, Mr. Nunn explained that any nonprofit that receives federal funds is subject to the rules of the U.S. Government Accountability Office. Those rules mandate an AICPA review.

Next, Mr. Nunn addressed concerns about the costs of peer reviews and the confidentiality of client information. With respect to costs, Mr. Nunn reported that a recent survey of Indiana CPA firms revealed that the average cost per billable hour for peer review fees ranged from 8.3¢ for a sole practitioner to 0.27¢ for a firm with a significant audit practice. He pointed out that these costs are spread over a period of three years. As to the

confidentiality of client information, Mr. Nunn noted that firms may redact any information that identifies a client in the documents submitted to a reviewer. Furthermore, two firms may not engage in "mutual reviews," in which the firm first reviewed conducts a subsequent review of the reviewing firm. According to Mr. Nunn, this prohibition serves to prevent collusion and safeguard client information. Finally, Mr. Nunn clarified that there is no requirement under the rules that a review be performed by an Indiana-based firm. He noted that as long as the reviewing firm is licensed in Indiana, its operations can be based in another state. The freedom to contract with a reviewer doing business in or outside Indiana (subject to the licensure requirement) should allay concerns of small-town practitioners that locally based reviewers would be able to identify clients even when identifying information is redacted.

Finally, Mr. Nunn reiterated that the peer review process is designed to be educational, instead of punitive. As proof that the educational objectives of peer reviews have been effective, Mr. Nunn cited statistics from 2001 indicating that more than 50% of the approximately 37,000 firms participating in the AICPA peer review program received excellent marks on a second or subsequent review. Among Indiana firms, only 10% of participating firms sampled had failed a review.

At that point, the Chairman asked how many of the firms that failed the review were members of the AICPA. Mr. Nunn indicated that he did not have access to that information. The Chairman then questioned the need for the proposed rules, noting that the Board had revoked only one Indiana license during the past 12 years. In response, Mr. Nunn pointed out that financial statements are becoming increasingly complex, creating the need for more oversight of the professionals preparing them. Additionally, he cited the practical need to bring Indiana's rules in line with those of 37 other states. Mr. Nunn further explained that the reason the Board had only revoked one license in the past twelve years was due to the fact that the Board has no budget to pursue complaints filed against accountants. As a result, the Board must forward such complaints to the Attorney General, essentially relinquishing authority over their review.

Before concluding his testimony, Mr. Nunn stressed that he did not have a conflict of interest in promulgating the proposed rules. He noted that his firm is just one of many other firms in and outside of Indiana that perform peer reviews. Furthermore, all firms and individuals must meet certain ethical standards in order to be approved as reviewers. He also clarified that he has never served on the board of the AICPA.

The Chairman then asked how a reviewing firm is chosen in a particular case and how the price for the review is determined. Mr. Nunn indicated that the reviewing firm must have expertise in the same area of work performed by the firm under review. He explained that pricing is negotiated between the parties involved. There is no standard fee review fee, with prices varying according to the size of the firm under review, and according to the type and number of engagements performed by that firm.

Noting the concerns of the earlier speakers about the costs of quality reviews, the Chairman asked Mr. Nunn whether the Board had considered submitting the rules to the Legislative Services Agency for a fiscal analysis under IC 4-22-2-28. Mr. Nunn replied that the Board had considered IC 4-22-2-28 and had determined, in consultation with the Board's attorney, that a fiscal analysis was not required.

At that point, Senator Kenley interjected to thank Mr. Nunn for his service on the Board and to suggest that quality reviews may require further consideration by the legislature, due to the policy issues involved.

(4) Testimony from Gary Bolinger, CAE

The Committee next heard from Gary Bolinger, President and CEO of the Indiana CPA Society (INCPAS). Mr. Bolinger began by suggesting that the need for quality review rules stems from the inadequacy of the current processes available to INCPAS and the Board to address the quality and integrity of accountancy services. As an example of the ineffectiveness of these processes, Mr. Bolinger cited a case in which INCPAS had filed a complaint with the Attorney General against one of its members on the basis of questionable accounting practices. While the member is presently incarcerated due to criminal charges arising from the same incident, the Attorney General has yet to act on the complaint. As a result, the member still holds a valid certificate to practice accountancy in Indiana. According to Mr. Bolinger, quality reviews could serve to prevent or remedy the questionable practices that lead to complaints in the first place, and would improve the quality and integrity of services provided.

Mr. Bolinger also addressed concerns about the confidentiality of client information, noting that the proposed rules require all peer reviewers to adhere to AICPA's *Standards for Performing and Reporting on Peer Reviews*. Under those standards, the reviewer is required to keep another firm's client information confidential. In addition, the oversight committee established by the rules would receive a peer review report that includes only a summary of the reviewer's findings. The report would not include any client-specific information.

Directing the discussion to the costs involved, the Chairman asked whether INCPAS would benefit financially from the adoption of the proposed rules. Mr. Bolinger stressed that INCPAS does not make a profit from administering the AICPA peer review program. In fact, for the fiscal year ended March 31, 2004, INCPAS had forecasted that program expenses would exceed revenues by $23,873. In response to the Chairman's question as to how the resulting deficit would be addressed, Mr. Bolinger indicated that INCPAS would have to either cut costs or increase dues.

After further discussion about whether a fiscal analysis under IC 4-22-2-28 should have been sought, the Chairman indicated that the Committee would take the issues surrounding the peer review rules under advisement. He obtained the consensus of the Committee to urge the Attorney General to delay his approval of the rule, so as to allow the issues to be debated during the upcoming legislative session.

Indiana State Department of Health Rules (LSA #02-231)

(1) Testimony from Steve Boyce[13]

Moving to the next item on the agenda, the Chairman invited testimony on the Indiana State Department of Health's (ISDH's) proposed rules concerning on-site sewage systems. He asked Steve Boyce, Governmental Affairs Director for the Indiana Builders Association (IBA), to share his concerns about the rules with Committee. Mr. Boyce began by acknowledging that the rule under consideration, LSA #02-321,[14] had actually been withdrawn by the ISDH in July 2004.[15] However, Mr. Boyce suggested that the rule

[13]See Exhibit 7.

[14]See Exhibit 8.

[15]See 27 IR 3079; July 1, 2004.

nevertheless warranted the attention of the Committee because of errors in the recently terminated rulemaking process, and because of the ISDH's plans to resubmit the rule.

Mr. Boyce stressed that the IBA does not oppose the adoption of a new septic rule, even one including new or expanded administrative and technical requirements. Rather, the IBA objects to the ISDH's proposed rule because it regulates the installation of new septic systems while ignoring existing systems that are failing. According to Mr. Boyce, the problem of septic systems discharging effluent and contaminating ground and surface waters is mainly caused by existing systems that were improperly designed and installed. By regulating the installation of new systems, the rule does not address the source of the current environmental threat.

Mr. Boyce further argued that the existing rules actually work when enforced. He noted that a study by Purdue University found that local jurisdictions with the resources to enforce the existing septic rules do so. Such enforcement has lead to repair rates as low as 3% in those areas. Mr. Boyce contended that jurisdictions that lack the resources to enforce the existing rules will not be able to enforce more demanding rules.

Finally, Mr. Boyce maintained the proposed rule suppresses the use of new technologies by regulating experimental and alternative technology systems in a way that creates an administrative bottleneck at the state level. Suggesting that these administrative hurdles would threaten the viability of the alternative technology industry within Indiana, he noted that this same industry had managed to serve other states effectively, especially in situations involving existing systems that are failing.

Senator Young asked what the annual cost would be to the regulated entities to comply with the proposed rules. Mr. Boyce stated that cost would be over $20 million per year for new construction. Mr. Boyce noted that Indiana homeowners would ultimately pay for these increased costs through higher home construction costs.

Senator Hume observed that there is a need for septic systems in Indiana's rural areas and expressed concern that the proposed rules would stifle the development of new technologies that could help meet this need.

(2) Testimony from David Kovich

Next, the Committee heard from David Kovich, a member of the IBA engaged in construction in Tipton County. Expressing his dissatisfaction with the way in which the ISDH conducted the recently terminated rulemaking process, Mr. Kovich suggested that the alleged flaws in the process may have led to the ISDH's decision to withdraw the rule. Mr. Kovich reported that the ISDH published its notice of intent to adopt the rule in the December 1, 2002, edition of the Indiana Register.[16] In response to that notice, Mr. Kovich submitted written comments, as solicited by the ISDH. According to Mr. Kovich, the ISDH never responded to his comments. Furthermore, when the proposed rule was published in the June 1, 2003, edition of the Indiana Register,[17] it incorporated certain technical specifications by reference.[18] However, in citing a particular edition of the specifications,

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[16]See 26 IR 815; December 1, 2002.

[17]See 26 IR 3116; June 1, 2003.

[18]See 410 IAC 6-8.2-58 (incorporating *Technical Specifications for On-Site Sewage Systems, 2003 Edition*).

the proposed rule failed to incorporate later amendments to the specifications. As a result, interested parties submitted comments and testified on the rule based on an outdated version of the specifications.

Many of the comments received occurred at three public hearings held across Indiana. According to Mr. Kovich, significant opposition to the rule was expressed at all three meetings, and the only comments not in direct opposition to the rule were suggestions for changes to the rule.

Mr. Kovich concluded by noting that the ISDH published a new notice of intent to adopt the rule in the August 1, 2004, edition of the Indiana Register. Mr. Kovich urged the Committee to monitor the new rulemaking process to ensure that the ISDH gives adequate consideration to public comments on the proposed rule.

Senator Kenley then asked whether there was a need for a new septic rule. Mr. Kovich replied that the existing rules needed only slight modifications. He noted that when the existing rules were promulgated, there was a sanitary engineer serving on executive board of the ISDH, as required by statute. However, at the time the withdrawn rule was being promulgated, there was no registered engineer on the executive board. He suggested that the input of the engineer at the time the existing rule was adopted helped assure its technical soundness and, as a result, few changes to that rule were needed.

Senator Hume asked how the proposed rule would affect the cost of septic systems. Mr. Kovich indicated that a gravity system currently costs between $2,500 and $3,000, while pump systems range from $4,000 to $7,000. Mr. Kovich estimated the new requirements would add $3,000 to $5,000 to the cost of a system.

(3) Testimony from Zach Cattell

Senator Young then asked for a response from the ISDH, at which point Zach Cattell, Legislative Liaison for the Office of the Deputy Health Commissioner, addressed the Committee. Mr. Cattell confirmed that a new notice of intent to adopt a rule was published in the August 1, 2004, edition of the Indiana Register. He reported that the ISDH would not publish a draft of the new rule until after it had received and considered input from interested parties. To this end, he noted that the ISDH would form a task force or working group to advise the Board on the proposed rule. He pointed out that a working group is not required by existing rulemaking statutes, but represented an additional step undertaken by the ISDH as a show of good faith.

Commenting on the statutory requirement that an engineer serve on the executive board of the ISDH, Mr. Cattell explained that the engineer that had been serving on the board had resigned during the time that the withdrawn rule was being promulgated. He reported that a new engineer had recently been appointed to the board.

In response to a question from Senator Young, Mr. Cattell stated that the ISDH had submitted the withdrawn rule to the Legislative Services Agency for a fiscal analysis. Senator Young then thanked Mr. Cattell for his testimony and indicated that the Committee would take the issues surrounding the septic rule under advisement.

Water Pollution Control Board Rules (317 IAC 15-13)

(1) Testimony from David Gaston

Turning to the final item on the agenda, Senator Young asked for testimony on the rules

adopted by the Water Pollution Control Board to address storm water run-off associated with local storm sewer systems. The Committee first heard from David Gaston, the Hendricks County surveyor, who expressed his frustration with how the Indiana Department of Environmental Management (IDEM) had been interpreting and administering the storm water rules adopted by the Board. Mr. Gaston began by explaining the origin of the rules. In December 1999, the federal Environmental Protection Agency (EPA) adopted regulations requiring states to pass rules expanding the National Pollutant Discharge Elimination System (NPDES) program to include the regulation of storm water runoff from small- and medium-sized communities. In response, the Board adopted the rules found at 327 IAC 15-13,[19] known as "Rule 13," which took effect in August 2003. Rule 13 applies to public and private entities that own or operate municipal separate storm sewer systems (MS4s). The rule requires MS4 entities to provide an initial baseline characterization of the water quality in waters that receive storm water, implement programs to reduce the negative effects of storm water on water quality, and monitor the effectiveness of the programs by comparing subsequent data to the initial baseline characterization. In establishing an initial baseline characterization under Rule 13, MS4 entities are required to submit a Baseline Characterization and Report ("Part B") as part of their Storm Water Quality Management Plan (SWQMP).

Under Rule 13, the water quality characterization must use either existing data or new data gathered from monitoring performed by the MS4 entity. The data gathered "may describe the chemical, biological, or physical condition of the MS4 area water quality."[20] Mr. Gaston complained that despite the permissive language of the rule, IDEM has in fact been applying an interpretation of Rule 13 that requires affected communities to conduct extensive chemical or biological testing of their receiving waters. As a result, in response to their Part B submissions, many communities have received notice of deficiency (NOD) letters from IDEM. According to Mr. Gaston, the NODs have required communities that lack existing data to submit "ongoing characterization plans" to gather new data. Mr. Gaston argued that such plans are not required by the rule, and that in any event, most affected communities do not have the financial resources to implement an ongoing monitoring plan. Mr. Gaston estimated that the cost of such monitoring in Hendricks County would cost over $150,000. In closing, Mr. Gaston stressed that Hendricks County would need help from IDEM to come up with acceptable baseline data that the county could afford to provide.

(2) Testimony from Dax Denton

Dax Denton, Legislative Associate for the Association of Indiana Counties, confirmed Mr. Gaston's claim that water sampling is cost-prohibitive for many communities subject to Rule 13. As an example, he pointed to Tippecanoe County, where water monitoring would cost $180,000 in upfront expenses alone. Mr. Denton reported that the chemical sampling parameters outlined in IDEM's guidelines for collecting baseline data[21] would cost counties between $100,000 and $200,000. He noted that this money would have to come from county budgets and would thus be unavailable for other governmental costs.

Mr. Denton argued that counties need more time and leeway to comply with Rule 13. He explained that Part B of the SWQMP was due on May 3, 2004, for most MS4 entities. In

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[19]See Exhibit 9.

[20]See 327 IAC 15-13-7.

[21]See Exhibit 10.

accordance with the rule, these entities were given just 30 days to respond to NOD letters. Given that the NODs have required entities to submit plans for ongoing water monitoring, the 30 day time frame has not afforded counties adequate time to locate existing data or to devise cost effective monitoring programs to generate new data. Because the EPA can impose federal penalties on MS4 entities for noncompliance, Mr. Denton emphasized that IDEM must be willing to work with the entities.

(3) Testimony from Nancy Michael

Senator Young next invited testimony from Nancy Michael, Mayor of Greencastle, Indiana. Ms. Michael pointed out that municipalities, as well as counties, have struggled to meet the data collection requirements imposed by IDEM. Despite her concerns about the costs involved, Ms. Michael commended IDEM for its willingness to work with Greencastle and other communities to help them comply with Rule 13. Ms. Michael suggested that IDEM itself did not have adequate time to review the Part B submissions, and thus did not give due consideration to the available data that were included in many of the submissions.[22]

Whatever the reason for the significant number of communities receiving NODs, Ms. Michael agreed with Mr. Denton that 30 days was not enough time for these communities to submit the responses sought by IDEM. She noted that many local governments received the NODs at the same time they were preparing their annual budgets. With many of these communities already facing budgetary constraints, the timing of the NODs left little opportunity for local governments to develop plans for financing ongoing water monitoring activities. Finally, Ms. Michael suggested that by requiring the use of either existing or new water quality data, Rule 13 imposes a greater financial burden on some smaller communities that lack existing data.

(4) Testimony from David Smoll

At that point, David Smoll, the Hancock County surveyor, spoke up to complain that his county had not received the same cooperation from IDEM that was apparently extended to the city of Greencastle. He expressed frustration with what he characterized as unfair treatment by IDEM toward some communities.

(5) Testimony from Tonya Galbraith

After representatives from affected communities had voiced their concerns, Senator Young invited a response from Tonya Galbraith, Director of Intergovernmental Relations for IDEM. Ms. Galbraith stated that she regretted the way the Part B NOD letters had been written. She reported that IDEM had scheduled meetings with interested parties and would send out a second letter to clarify its intent with respect to the responses sought from the MS4 entities. Stating that she did not believe the parties were at an impasse, Ms. Galbraith pledged to improve communications with the affected communities. She noted that IDEM was sensitive to the budgetary constraints of local governments. At Senator Young's request, she agreed to update the Committee of the status of IDEM's outreach efforts at the Committee's next meeting.

Following Ms. Galbraith's remarks, the Chairman indicated that the Committee would stay abreast of the issues surrounding Rule 13. The Committee then agreed to meet again on

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[22]Under 327 IAC 15-13-7(c), IDEM must review a Part B report within 90 days of submission. If IDEM does not issue a notice of sufficiency (NOS) letter or an NOD letter within the 90 day review period, the report is deemed sufficient.

October 12, 2004, at 10:00 a.m. The Chairman adjourned the meeting at 12:45 p.m.